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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO.

PATRICK T. ROGERS,

Petitioner

- vs -

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF THE
STATE OF CONNECTICUT

JOHN R. WILLIAMS
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Counsel for Petitioner

QUESTION PRESENTED

1. Did the Connecticut Appellate Court in ruling that the State did not violate Petitioner's Fifth and Fourteenth Amendment rights by presenting evidence during its direct case, again on cross-examination of the Petitioner during his case, and yet again as its rebuttal case, concerning Petitioner's post-Miranda request for the assistance of counsel, and in further ruling that by responding to such evidence during presentation of the defense case Petitioner had waived his constitutional objections to the State's actions, so completely ignore the prior holdings of this Court that certiorari should be granted to compel State court obedience to the dictates of the United States Constitution?

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The Petitioner, PATRICK T. ROGERS, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Appellate Court of the State of Connecticut entered in this proceeding on December 2, 1986.

OPINION BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at 9 Conn. App. 208 (1986), and appears in the Appendix hereto.

JURISDICTION

The opinion of the Appellate court of the State of Connecticut was entered on December 2, 1986. A timely petition for review of the Appellate Court decision by the Supreme Court of the State of Connecticut was denied on February 10, 1987. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. Did the Connecticut Appellate Court in ruling that the State did not violate Petitioner's Fifth and Fourteenth Amendment rights by presenting evidence during its direct case, again on cross-examination of the Petitioner during his case, and yet again as its rebuttal case, concerning Petitioner's post-Miranda request for the assistance of counsel, and in further ruling that by responding to such evidence during presentation of the defense case Petitioner had waived his constitutional objections to the State's actions, so completely ignore the prior holdings of this Court that certiorari should be granted to compel State court obedience to the dictates of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

U.S. Constitution, Amendment XIV:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted at a trial in the Connecticut Superior Court of the crime of sexual assault in the first degree. It was undisputed that Petitioner and the alleged victim had engaged in consensual sexual relations on several prior occasions. Petitioner's defense was consent. Trial was essentially a contest between the comparative credibility of Petitioner and the alleged victim.

During its direct case, the prosecution presented testimony that after Petitioner had been arrested in this case and read his Miranda rights, he had admitted to the police that he and the alleged victim had engaged in sexual relations on the night in question but had asserted that the sex was voluntary on her part; and that having so

stated Petitioner then terminated questioning by requesting a lawyer. On cross-examination of Petitioner during presentation of the defense, the State again elicited evidence that Petitioner had terminated police interrogation by requesting the assistance of an attorney. Finally, during its rebuttal case, the State again called the arresting officer to the stand and again elicited from him the fact that Petitioner had terminated interrogation by requesting an attorney and that the police had thereupon ceased questioning although they had other questions they wished to ask.

During presentation of the direct prosecution case, the arresting officer testified specifically that he had questioned Petitioner only after reading him

his Miranda rights. He testified that after Petitioner had admitted engaging in voluntary sex with the alleged victim, the officer advised Petitioner that he was facing a charge of rape. The prosecution then specifically elicited from the arresting officer the fact that the defendant, having been so advised, stated: "I don't want to talk to you anymore. I want a lawyer." The prosecutor then emphasized this point by again asking the arresting officer whether the questioning had ended at the request of Petitioner. The officer responded that it had. (Tr. pp. 253-57)

Petitioner testified on his own behalf. On cross-examination the prosecutor asked him the following questions: "Isn't it true that after all of these questions were asked, you gave the answers, you then said,

'I don't want to answer anymore questions, please contact my lawyer'?" (Tr. p. 320) "Again, let's see if it helps refresh your recollection whether or not you said, 'I don't want to answer anymore questions.' You want to contact a lawyer." (Ibid.) "When you were being interviewed...you repeatedly were telling him,...you didn't want to talk." (Tr. p. 328) "Even though you were in a state of confusion, you had enough presence of mind to ask for an attorney?" (Tr. p. 329)

The State again called the arresting officer as its rebuttal witness and asked this officer the following questions: "You had previously testified concerning the interview you had with Mr. Rogers at the Milford Police Department. And you indicated, at one point, that the inter-

view was concluded, is that correct?" "Would you indicate to the members of the jury the circumstances under which you concluded the interview?" "Did you continue to ask him any other questions after he made that statement to you?" "But there were other questions you wanted to ask?" (12/16/83 Tr. pp. 16-17)

As to all of this, the Connecticut Appellate Court held that there was no constitutional violation. 9 Conn. App. at 217. The Court went on to observe that the defense attorney had not objected to these lines of inquiry at trial and had questioned the defendant during presentation of the defense case about his reasons for declining to continue the interrogation. The Court held: "Any constitutional objection...therefore, has been waived." 9

Conn. App. at 217-18.

REASONS FOR GRANTING THE WRIT

THE CONNECTICUT APPELLATE COURT IN RULING THAT THE STATE DID NOT VIOLATE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BY PRESENTING EVIDENCE DURING ITS DIRECT CASE, AGAIN ON CROSS-EXAMINATION OF THE PETITIONER DURING HIS CASE, AND YET AGAIN AS ITS REBUTTAL CASE, CONCERNING PETITIONER's POST-MIRANDA REQUEST FOR THE ASSISTANCE OF COUNSEL, AND IN FURTHER RULING THAT BY RESPONDING TO SUCH EVIDENCE DURING PRESENTATION OF THE DEFENSE CASE PETITIONER HAD WAIVED HIS CONSTITUTIONAL OBJECTIONS TO THE STATE'S ACTIONS, SO COMPLETELY IGNORE THE PRIOR HOLDINGS OF THIS COURT THAT CERTIORARI SHOULD BE GRANTED TO COMPEL STATE COURT OBEDIENCE TO THE DICTATES OF THE UNITED STATES CONSTITUTION.

This case presents an extreme example of the refusal of State Appellate Courts to follow the constitutional dictates of this Court. It would be difficult to imagine a more extreme or blatant violation of the

rule in Doyle v. Ohio, 426 U.S. 610 (1976), most recently restated in Wainwright v. Greenfield, ___ U.S. ___, 106 S.Ct. 634 (1986).

The Connecticut Appellate Court attempted to evade its constitutional responsibility by finding that the evidence presented by the prosecutor in this manner was simply part of a straightforward narrative of Petitioner's conversation with the police. Were this the case, surely it would not have been necessary to ask about it twice during presentation of the State's case-in-chief; nor to have cross-examined Petitioner about it on four separate occasions; nor to have presented additional evidence on the same topic as the only rebuttal evidence offered during the trial.

Petitioner in this case was originally charged with five separate crimes, all upon the basis of the testimony of the one alleged victim. Significantly, the jury acquitted him of four of the five counts. Clearly the prosecution case was considered marginal at best by this jury. Had the prosecution been limited to presentation of constitutionally-acceptable evidence, it seems probable that Petitioner would have been acquitted of the rape charge as well.

Finally, in holding that the presentation of responsive evidence during the defense case constitutes a waiver of the constitutional violation, the Appellate Court clearly ignored the fundamental rule that presumes constitutional rights are not waived. Johnson v. Zerbst, 304 U.S. 458 (1938).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of the State of Connecticut, to bring this Court into compliance with the dictates of the Fifth and Fourteenth Amendments.

Respectfully submitted:

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APPENDIX

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STATE OF CONNECTICUT

V.

PATRICK T. ROGERS

(3163)

Appellate Court of Connecticut.

Argued September 17, 1986.

Decided December 2, 1986.

Before HULL, SPALLONE and BIELUCH, Js.

Information charging the defendant with the crimes of sexual assault in the first degree, burglary in the first degree and unlawful restraint in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before Rottman, J.; verdict and judgment of guilty of sexual assault in the first degree, from which the defendant appealed to this court. No error.

John R. Williams, New Haven, for appellant (defendant).

Office of the Chief State's Attorney, for appellee (State).

BIELUCH, J. After a jury trial, the defendant was found guilty of sexual assault in the first degree, a violation of General Statutes §53a-70(a). A judgment of conviction was rendered upon the jury's verdict and the defendant was sentenced to a term of six years.[1] The defendant has appealed from the judgment of conviction, alleging error in that he was denied his

1 The defendant was charged by information with sexual assault in the first degree, in violation of General Statutes §53a-70(a), burglary in the first degree, in violation of General Statutes §53a-101(a)(2), and unlawful restraint in the first degree, in violation of General Statutes §53a-95(a). All three offenses were alleged to have been committed on August 27, 1983. The defendant was also charged in two other

right to testify on his own behalf when the court precluded his testimony concerning prior false rape accusations allegedly made by the victim. He also claims that the trial court erred by denying him the right to the assistance of counsel, the right to be free from compelled self-incrimination and his due process right to a fair trial by permitting the state to offer as evidence of guilty his request to see an attorney after being given his Miranda warnings. We find no error.

The jury could reasonably have found

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1 (con't.) informations with separate additional counts of sexual assault in the first degree upon the same victim on August 10 and August 12, 1983, respectively. The three cases were consolidated for trial and resulted in the single conviction now on appeal.

the facts to be as follows: The defendant met the victim in April, 1983. They had engaged in consensual sexual intercourse at the victim's apartment on several occasions prior to August 27, 1983. During this time, the victim continued to see other men, rejecting the defendant's repeated requests that she be his steady girlfriend.

Shortly after midnight on August 27, 1983, the defendant encountered the victim at a bar. The victim resisted the defendant's attempt to talk to her, after which the pulled at her and ordered her to sit down. When she started to get up, a bartender came over and a fight broke out between him and the defendant. The defendant was removed from the bar and the fight continued outside.

The victim remained at the bar until it

closed at 3 a.m. After visiting with a friend, she returned to her apartment at approximately 4 a.m. to find the defendant in her bed. She yelled at him to "get out. I don't want you to stay here." Angry at her for not going out with him that evening, he said he was going to spend the night with her and started to take off her clothes. She could not stop him from disrobing her.

During the hours that followed, the defendant forced her to have sexual intercourse several times. It would serve no useful purpose to recite the sordid details surrounding the sexual assaults. Suffice it to say that the manner in which the defendant sexually attacked his victim belies any allegation of her consent which the defense asserted at trial. The evi-

dence demonstrates that during the assault the defendant pinned the victim's arms with his knees, struck her in the face with his hand, and stuck a towel in her mouth to deaden the sound of her crying. The victim eventually escaped from the defendant, and ran to a nearby house. The police were then called and the victim was taken to a hospital.

The defendant was arrested and brought to the Milford police station, where he was informed of his Miranda rights, after which he orally waived his right to remain silent and his right to counsel. He told the police that he had sexual relations with the victim that morning, admitting specifically that they had sexual intercourse. He claimed that these activities were at first consensual, "but then she got upset."

After that statement, the defendant concluded by saying, "I don't want to talk to you anymore. I want a lawyer." The police stopped questioning him at that point.

I

The defendant's first claim is that the court denied his right to testify concerning prior false rape accusations allegedly made by the complaining witness. The defendant claims that by doing so the court denied him his right to testify on his own behalf, as guaranteed by the fifth, sixth and fourteenth amendments to the United States constitution and by the constitution of Connecticut, article first §8.

The background relevant to this claim is as follows: The defendant sought to introduce evidence to establish that the victim had made a false accusation of rape

arising out of an alleged incident which has occurred two or three years earlier when she was picked up while hitchhiking. During the defense counsel's cross-examination of the victim out of the presence of the jury, she denied accusing anyone of rape on that occasion.

The defendant subsequently testified in his own defense. During his direct testimony, out of the presence of the jury, he related a conversation with the victim in which she told him that while hitchhiking home from a bar, she was picked up by two men in a white Corvette who took her to a hotel room where they raped her. The following morning they brought her home. The defendant then went on to state that "[s]he said that it did happen ... she said she was kind of high at the time, and maybe

[it] wasn't a rape." That was the sole basis for the claim of a prior false accusation of rape. The defendant attempted to offer this evidence to impeach the victim's credibility, even though no criminal or other complaint by her had ever been made concerning that incident.

The trial court ruled that the proffered evidence was inadmissible to impeach the complainant's credibility. The defendant excepted to the trial court's ruling. The defendant now claims for the first time that this extrinsic evidence was proper to show bias, and that the exclusion of such evidence violated the defendant's right to testify in his own behalf.

Ordinarily, "[o]ur review of evidentiary rulings made by the trial court is limited to the specific legal ground raised

in the objection. Practice Book §§3063 [now §4185], 288; State v. Rothenberg, 195 Conn. 253, 262, 487 A.2d 545 (1985); State v. Braman, 191 Conn. 670, 684-85, 469 A.2d 760 (1983). The reason for this rule is clear: it is to alert the trial court to an error while there is time to correct it; State v. Rothenberg, supra, 263; State v. Jones, 193 Conn. 70, 88, 475 A.2d 1087 (1984); and to give the opposing party an opportunity to argue against the objection at trial. To permit a party during trial would amount to 'trial by ambuscade,' unfair both to the trial court and to the opposing party. State v. Brice, 186 Conn. 449, 457, 442 A.2d 906 (1982); State v. DeGennaro, 147 Conn. 296, 304, 160 A.2d 480, cert. denied, 364 U.S. 873, 81 S.Ct. 116, 5 L.Ed.2d 95 (1960)." (Footnote

omitted). State v. Sinclair, 197 Conn. 574, 579, 500 A.2d 539 (1985). The trial court was correct in ruling that the extrinsic evidence was inadmissible to impeach the victim's credibility. The matter to which the defendant attempted to testify was clearly collateral to the present case. Extrinsic evidence is not admissible to impeach the credibility of a witness on a collateral issue. State v. Carbone, 172 Conn. 242, 262, 374 A.2d 215, cert. denied, 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977).

The defendant failed to offer this evidence to show bias, and made no objection at trial on that ground. On appeal, however, he has couched this claim in terms of a deprivation of a fundamental constitutional right. We need to decide, there-

fore, whether this claim reflects the "exceptional circumstances" reviewable under State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973). See State v. Delgado, 8 Conn. App. 273, 276, 513 A.2d 701 (1986).

"An appellate court must ask a series of questions when an Evans claim is made and answer each in the affirmative before continuing to the succeeding question. These questions are as follows: (1) is there an issue raised which facially implicates a constitutional right; (2) is the record sufficient to consider that constitutional claim on its merits; (3) was there, in fact, based on the record, a deprivation of a constitutional right of a criminal defendant; and (4) did the deprivation deny the defendant a fair trial, thereby requiring that the judgment

rendered following a conviction by a jury be set aside." State v. Newton, 8 Conn. App. 528, 531, 513 A.2d 1261 (1986). Because there is a record adequate for us to review the merits of the defendant's claim, it will be afforded an Evans review. The right of an accused to testify on his own behalf derives from the fifth, sixth and fourteenth amendments to the United States constitution.[2] See United States v. Bifield, 702 F.2d 342, 347-50 (2d Cir.), cert. denied, 461 U.S. 931, 103 S.Ct. 1095, 77 L.Ed.2d 304 (1983); see also Nix v. Whiteside, ___ U.S. ___, 106 S.Ct. 988,

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2 The United States Supreme Court has recognized the accused's right to testify as "essential to due process of law in a fair adversary process." Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

993, 89 L.Ed.2d 123 (1986)(habeas corpus). The right of an accused "to be heard by himself and by counsel" is also expressly guaranteed by article first, §8, of the Connecticut constitution.[3] In recognizing the existence of this fundamental right, however, we also recognize that "[a] defendant's right to present a full defense, including the right to testify on his own behalf, is not without limits. In responding to the charges against him, an accused must comply with the established rules of procedure and evidence, as must

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3 Although the defendant on appeal alleges a violation of the constitutions of the United States and of Connecticut, he fails to advance any argument to distinguish between his federal and state rights. Under the circumstances of this case, therefore, we deem these respective rights to be coextensive. See State v. Alexander, 197 Conn. 180, 183 n. 1, 496 A.2d 486 (1985).

the prosecution, in order to insure a fair trial. See United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976). A criminal defendant's right to present a full defense and to receive a fair trial does not entitle him to place before the jury evidence normally inadmissible. See id. at 1051-52 (duplicative evidence may be excluded in court's discretion) ... see also Hughes v. Matthews, 576 F.2d 1250, 1258 (7th Cir.)("the right of a defendant to present relevant and competent evidence is not absolute and may "bow to accommodate other legitimate interests in the criminal trial process"'), cert. denied, 439 U.S. 901, 99 S.Ct. 43, 58 L.Ed.2d 94 (1978)." (Citation omitted.) United States v. Bifield, supra, 350 (upholding trial court's ruling that the defense of duress

or necessity failed as a matter of law and could not be presented to the jury.)[4]

A careful analysis of the defendant's claim in the trial record reveals no deprivation of his fundamental constitutional rights. The trial court's contested ruling was well within the established

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4 Counsel for the defendant on this appeal also represented the defendant in United States v. Bifield, 702 F.2d 342 (2d Cir. 1983), where he raised a similar issue on appeal, namely, whether the effect of the trial court's ruling rejecting as a matter of law the appellant's defense of duress and necessity to the charge of escape denied him his constitutional and statutory right to testify on his own behalf before the jury which tried him. Since the holding in Bifield of the United States Court of Appeals, Second Circuit, in the territorial jurisdiction of which we are located, was adverse to the claim advanced in that case, and now made to us on this appeal, we note with professional concern the failure of the same counsel in both appeals to cite that precedent of great weight to the issue under consideration by us either in his brief or in oral argument.

rules of procedure and evidence for a criminal prosecution, and in no way violated the defendant's right to testify on his own behalf.

While the parameters of a defendant's right to testify are undefined; see 3 W. LaFave & J. Israel, Criminal Procedure §23.3(g); we need not determine whether such right guarantees the admission of evidence despite the defendant's failure to assert proper evidentiary grounds at trial. Moreover, we need not consider whether, by such failure, the defendant has waived such a right. In the present case, we fail to see how the defendant's testimony could have evidenced bias in the complainant when all that the defendant could state was that the victim had once said to him that she may have been raped, but she was not sure.

Such an inconclusive and unassertive statement can hardly be probative of a bias on the part of the complainant for later charging the defendant with sexual assault in the first degree, in violation of §53a-70(a) of the General Statutes.

II

The defendant's second claim is that the trial court erred by permitting the state to offer evidence of the defendant's assertion of his right to an attorney and his right to remain silent as evidence of the defendant's guilt.

The defendant cites three instances during the trial where the prosecution's examinations of witnesses made reference to the defendant's invocation of his right to remain silent and his right to counsel in terminating his statement to the police.

The defendant concedes that he completely failed to make an objection to the testimonial references to the defendant's assertion of his constitutional right to terminate his police questioning. The defendant's second claim, therefore, may only be reviewed if it falls within the "exceptional circumstances" defined in State v. Evans, supra.

Again, we agree with the defendant that he has raised an issue of a fundamental constitutional right and that there is a record adequate for an Evans review. See State v. Casey, 201 Conn. 174, 182, 513 A.2d 1183 (1986). The defendant claims that the prosecutor's questions and witnesses' responses[5] to them relating to

5 The defendant has challenged the prosecutor's direct and rebuttal examination of

the defendant's termination of his voluntary statement to the police served

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5 (con't.) Lieutenant William Graham, and his cross-examination of the defendant. A review of Graham's direct testimony reveals that Graham merely recounted the circumstances under which the defendant was booked at the police station, was advised of his constitutional rights, and orally waived those rights. A conversation then ensued between the officer and the defendant, culminating in the defendant's refusal to answer any more questions and his assertion of his right to counsel.

As to the state's cross-examination of the defendant, the transcript reveals that the defendant admitted being interviewed on other occasions by police. He claims to have asserted his right to counsel throughout the whole conversation with Graham. He also acknowledged that he was provided with food during the conversation, and that there were other policemen present during questioning.

As to Graham's rebuttal testimony, the record demonstrates that Graham again testified as to the duration of the questioning and that he stopped the interview as soon as the defendant requested an attorney, although there were more questions which the officer wanted to ask.

to the police served to deny the defendant his right to the assistance of counsel, his right to be free from self-incrimination and his right to a fair trial, as guaranteed by both the federal and state constitutions.[6]

A prosecutor's reference to a defendant's assertion of his right to remain silent is not always constitutionally impermissible. State v. Casey, supra, 183. Such evidence may be "'presented by the state to show the investigative effort made by the police and the sequence of events as they unfolded (an acceptable purpose under State v. Ralls, [167 Conn. 408, 427-29, 356

6 Again, as in the first issue, the defendant has failed to claim a distinction between his federal and state constitutional rights. Consequently, we shall treat them as coextensive. See footnote 3, supra.

A.2d 147 (1974)].' State v. Moye, [177 Conn. 487, 496, 418 A.2d 870, vacated and remanded on other grounds, 444 U.S. 893, 100 S.Ct. 199, 62 L.Ed.2d 129, on remand, 179 Conn. 761, 409 A.2d 149 (1979]." State v. Casey, supra.

The witnesses' remarks elicited by the prosecution were merely factual accounts and narratives of the police interrogation of the defendant wherein and until the defendant asserted his right to remain silent and his right to counsel. There is no indication on the record that the prosecutor made any remarks which could reasonably be perceived as prejudicial to the defendant's rights. Likewise, there is no evidence in the record to support the defendant's claim that the evidence of his assertion of his rights was offered to

demonstrate his guilt. Cf. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

We also note that the defense counsel questioned the defendant on direct examination about his assertion of the right to remain silent and the right of an attorney. This questioning indicates that the defendant's failure to object was not due to inadvertence, inattention or mistake, but was a tactical decision at trial. Any constitutional objection to its admission, therefore, has been waived. See State v. Moye, supra, 499.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

SUPREME COURT

STATE OF CONNECTICUT

STATE OF CONNECTICUT V. PATRICK T. ROGERS

The defendant's petition for certification for appeal from the Appellate Court, 9 Conn. App. 208, is denied.

John R. Williams, in support of the petition.

Judith Rossi, deputy assistant state's attorney, in opposition.

Decided February 10, 1987

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Petitioner,

v.

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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF CONNECTICUT

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

WHETHER THE CONNECTICUT APPELLATE COURT ERRED IN HOLDING THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY TESTIMONY CONCERNING THE DEFENDANT'S INVOCATION OF HIS MIRANDA RIGHTS TO TERMINATE HIS VOLUNTARY STATEMENT TO THE POLICE, WHERE THE TESTIMONY WAS MERELY A FACTUAL ACCOUNT OF THE SCOPE OF INTERROGATION AND WAS NOT UTILIZED AS EVIDENCE OF GUILT; AND IN HOLDING THAT THE PETITIONER HAD WAIVED THE CLAIM OF CONSTITUTIONAL ERROR

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STATUTES AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

OPINION BELOW

The opinion of the Connecticut Appellate Court (Pet. App. A) is reported at 9 Conn.App. 208 (1986). The Connecticut Supreme Court's denial of certification is reported at 201 Conn. 806 (1987).

STATEMENT OF THE CASE

The petitioner was tried by a jury on three counts of sexual assault in the first degree, one count of burglary in the first degree, and one count of unlawful restraint. The jury convicted him on one count of sexual assault in the first degree, and found him not guilty on all other counts. The petitioner was sentenced to six years imprisonment.

At the petitioner's trial the state called Lieutenant Graham as a witness to recount the circumstances under which petitioner was booked at the police station, was advised of his Miranda rights, and orally waived those rights. After the waiver, the petitioner then gave his version of the incident for

which he was arrested, indicating that he had engaged in consensual sexual relations with the victim until "she got upset". When asked if he had determined what the petitioner had meant by "she got upset", the police officer responded

> No, that was when the -- After he said that, he said, "I don't want to talk to you anymore. I want a lawyer."

Defense counsel did not object to this testimony, nor did he request a curative instruction by the court.

The prosecutor did not pursue or focus on the termination of the interview or the unexplained nature of the victim's upset state. Instead, he concentrated on the contents of the petitioner's responses to the interrogation. At the conclusion of this inquiry, the prosecutor asked, "Then you ended at his request?" Lieutenant

Graham responded, "Then he said he wanted a lawyer, the interview ended." No objection was interposed by defense counsel. No further reference to the petitioner's termination of the postarrest interview was made during the state's case-in-chief.

After the state rested, the petitioner testified in his own defense. During his direct testimony, the petitioner recounted his version of his sexual encounter with the victim, which he characterized as consensual. He also testified that the police obtained his statement by insisting that he talk to them, despite his unwillingness to do so and despite his request for counsel.

The prosecutor then cross-examined the petitioner about the circumstances of the postarrest interview and the

voluntariness of his custodial statement. Again, the petitioner testified that Lieutenant Graham had insisted that he talk, despite the fact that "I told him several times that I didn't want to talk to him" and " I told him I wanted to speak to my attorney." The following colloquy ensued:

[Prosecutor]: So, you had invoked the right, your rights, which you had a right to do, and he violated it [sic]?

[Petitioner]: More or less, yes.

* * *

[Prosecutor]: Isn't it true that after all of these questions were asked [by the police], you gave answers, you then said, "I don't want to answer any more questions, please contact my lawyer"?

[Petitioner]: I told them that through-

out the whole conversation.

Defense counsel made no objection to the foregoing cross-examination. After the defense had rested, the state called Lieutenant Graham in rebuttal:

* * * * *

[Prosecutor]: Would you indicate to the members of the jury the circumstances under which you concluded the interview [with the petitioner]?

[Lieutenant Graham]: Well, as I said before, the interview went on for fifteen or twenty minutes at the most. Some of the things, you know after he made [sic] some of the things that he said and I was asking him things, questions. And he said that he didn't want to answer any more questions, he wanted a lawyer. And that's when I stopped [the interview].

[Prosecutor]: Did you continue to ask him any other questions after he made that statement to you?

[Lieutenant Graham]: No, absolutely not.

Defense counsel raised no objection to this testimony, nor did he request a mistrial or a curative instruction.

On appeal to the Connecticut Appellate Court, the petitioner claimed that the prosecutor's questions and witnesses' responses violated his constitutional rights. The Appellate Court afforded review to this claim despite the petitioner's conceded failure to raise it at trial. (Pet. App. at 19a). The Appellate Court rejected the claim, noting that a prosecutor's reference to a defendant's invocation of his right to remain silent

"is not always constitutionally impermissible" where such evidence is presented to recount the sequence of events in the police investigation. (Pet. App. at 21a) The Appellate Court held:

> The witnesses' remarks elicited by the prosecution were merely factual accounts and narratives of the police interrogation of the defendant wherein and until the defendant asserted his right to remain silent and his right to counsel. There is no indication on the record that the prosecutor made any remarks which could reasonably be perceived as prejudicial to the defendant's rights. Likewise, there is no evidence in the record to support the defendant's claim that the evidence of his assertion of his rights was offered to demonstrate his guilt. Cf. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).
>
> We also note that the defense counsel questioned the defendant on direct examination about his assertion of

> the right to remain silent and the right of [sic] an attorney. This questioning indicates that the defendant's failure to object [during the state's case-in-chief] was not due to inadvertence, inattention or mistake, but was a tactical decision at trial. Any constitutional objection to its admission therefore, has been waived. See State v. Moye, [177 Conn. 487,] 499 [418 A.2d 870, vacated and remanded on other grounds, 444 U.S. 893 (1979)].

(Pet. App. A at 22a-23a). The Connecticut Supreme Court denied petitioner's petition for certiorari. State v. Rogers, 201 Conn. 806 (1987).

REASONS FOR DENIAL OF THE WRIT

THE PETITION FAILS TO DEMONSTRATE ANY CONFLICT BETWEEN THE CONNECTICUT APPELLATE COURT'S DECISION AND THE CONTROLLING PRECEDENTS OF THIS COURT

The petitioner's claim is premised on the assumption that in Doyle v. Ohio, 426 U.S. 610 (1976), this Court established a complete ban on inquiry at trial into a defendant's postarrest silence in the exercise of his Miranda rights. The respondent submits that this premise is erroneous, thus providing an inadequate basis for the writ of certiorari.

In Miranda v. Arizona, 384 U.S.436 (1966), this Court stated the general rule that

> it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interroga-

> tion. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

384 U.S. at 468 n. 37. In Doyle V. Ohio, supra, this Court stated:

> [S]ilence in the wake of [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights... it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

426 U.S. at 617-18. The Court expressly stated, however, that this prohibitive rule did not apply in all cases:

> It goes without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather

> to challenge the defendant's testimony as to his behavior following arrest. (citation omitted)

Id. at 619-20 n. 11.

Other courts have subsequently held that in certain situations, references to a defendant's invocation of Miranda rights are not always constitutionally impermissible, or may be harmless error. See, e.g., United States V. Morales-Quinones, 812 F.2d 604 (10th Cir. 1987)(no error where reference brief, not elicited by prosecutor nor used to infer guilt, and not likely that jury would necessarily take it as comment on silence); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) (error harmless where testimony did not focus on specific accusations to which defendant remained silent, and defendant subsequently talked to FBI agents);

United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986) (use of postarrest silence for impeachment purposes harmless where theory of defense patently frivolous and postarrest silence not highlighted); United States v. Makhlouta, 790 F.2d 1400 (9th Cir. 1986) (no error in prosecutor's inquiry into omission from postarrest statement of explanation offered at trial); Hockenbury v. Sowders, 718 F.2d 155 (6th Cir. 1983), cert. denied, 466 U.S. 975 (1984) (prosecutor's comments on omission of significant facts from postarrest statement not designed to draw meaning from silence and pertinent to defendant's trial testimony); United States v. Collins, 652 F.2d 735 (9th Cir. 1981) (references to invocation of rights "mere recitation" of sequence of

events; no error); United States v. Mavrick, 601 F.2d 921 (7th Cir. 1979) (prosecutor correcting inaccurate impression created by defendant's direct testimony); United States v. Agee, 597 F.2d 350 (3d Cir. 1979) (defendant not silent after receiving Miranda warning; inquiry about his attempt to deceive police with false statements not improper); Bradford v. Stone, 594 F.2d 1294 (9th Cir.1979) (prosecutor's references to defendant's postarrest silence harmless where defense counsel did not object to first reference and later pursued the subject himself in closing argument); United States v. Whitaker, 592 F.2d 826 (5th Cir, 1979), cert. denied, 444 U.S. 950 (1980) (prosecutor inadvertently elicited testimony regarding defendant's postar-

rest silence and did not focus it); United States v. Williams, 556 F.2d 65 (D.C. Cir.), (denial of petition for rehearing), cert. denied, 431 U.S. 972 (1977) (not error for witness recounting defendant's postarrest statement to indicate that defendant terminated the statement, else jury might erroneously infer that police failed to give him full opportunity to give his account; any error in testimony about request for counsel harmless); United States v. Sklaroff, 552 F.2d 1156 (5th Cir. 1977), cert. denied, 434 U.S. 1009 (1978) (reference harmless when witness's comments were spontaneous, defendant's silence did not impeach exculpatory story and trial court instructed jury to disregard comments); State v. Casey, 201 Conn. 174, 513 A.2d 1183 (1986)

(introduction of testimony permissible to show sequence of events as they unfolded; Doyle not applicable because defendant did not remain silent after arrest); Hairston v. United States, 496 A.2d 1097 (D.C.App. 1985) (error harmless where prosecutor did not deliberately elicit testimony of defendant's request for counsel and evidence of guilt was strong); State v. Robinson, 620 P.2d 703 (Ariz. App 1980), cert. denied, 450 U.S. 1044 (1981) (testimony that defendant terminated postarrest statement admissable to place statement in context); People v. Martinez, 408 N.E.2d 358 (Ill. App. 1980) (Introduction of evidence that defendant invoked rights to terminate postarrest statement not a Doyle violation); Parks v. State, 543 S.W.2d

855 (Tenn. App. 1976) (where defendant did not remain silent but made postarrest statement, officer's testimony on poststatement invocation of rights not prejudicial, but merely a comment on scope of the statement).

The petitioner relies on the Doyle principle as barring the initial testimony of Lieutenant Graham which set forth the circumstances in which the postarrest interview was terminated. The petitioner wholly failed to object to this or to any of the testimony he now characterizes as constitutionally offensive. While the failure to object does not deprive this Court of jurisdiction since the Connecticut Appellate Court reviewed petitioner's claim on the merits under an exception to Connecticut's contemporaneous objection rule,

Harlin v. Missouri, 439 U.S. 459, 459 (1979); the absence of any objection does indicate that at trial the petitioner acquiesced in the testimony about postarrest events, or at least regarded it as inconsequential. Moreover, as the Appellate Court's opinion demonstrates, the Doyle principle is not applicable here, where the prosecutor never suggested that the invocation of rights was inconsistent with the defense theory, or that it was evidence of petitioner's guilt, but simply elicited it as part of the narrative account of the postarrest interview. See Hockenbury v. Sowders, supra; United states v. Collins, supra; United States v. Williams, supra; State v. Casey, supra; State v. Robinson, supra; Parks v.

State, supra.1

Even if admission of the challenged testimony could be construed as a Doyle violation, it is subject to harmless error analysis. United States v. Kimberlin, supra; United states v. Makhlouta, supra; United States v. Sklaroff, supra. In its brief to the Connecticut Appellate Court, the respondent raised harmless error as grounds for affirming the conviction. See Respondent's Appendix Because the Appellate Court found the doyle prin-

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1 The petitioner cites Wainwright v. Greenfield, __U.S.__, 106 S.Ct. 634 (1986) in support of his petition. Greenfield is factually inapposite to the instant case. In Greenfield, the defendant's invocation of his Miranda rights was offered as evidence of his sanity, a contested issue in the case. By contrast, the Appellate court in the instant case expressly found that the challenged testimony was not prejudicial to the defense and was not offered to prove guilt. (Pet.App. A at 22a-23a)

ciple inapplicable to the facts of this case, it never reached the harmlessness question. But the petitioner's failure to explain the nature of the victim's upset condition could have had only a slight effect, if any, on his own credibility, and no effect on establishing his guilt. The petitioner therefore asks this Court to grant certiorari in order to consider an issue which may ultimately be found to be harmless error. Such a use of this Court's precious resources is inappropriate. See United States v. Johnston, 268 U.S. 220, 227 (1925) (this Court does "not grant a certiorari to review evidence and discuss specific facts").

The petitioner also challenges the cross-examination and rebuttal testimony which followed his direct testimony

about the circumstances of his postarrest interview. As noted, the petitioner never objected to any of the challenged testimony. Indeed, the Connecticut Appellate Court expressly found the petitioner's failure to object was not due to inadvertence or mistake, but was a tactical decision to utilize evidence of the invocation of his rights to his own benefit. (Pet. A App. at 23a). See United States v. Mavrick, supra; Bradford v. Stone, supra. By his own direct testimony, the petitioner put in issue the circumstances of his postarrest interview, particularly the voluntariness of his statements. See Statement of the Case, supra. On cross-examination the prosecutor was certainly entitled to attempt to discredit the defendant's

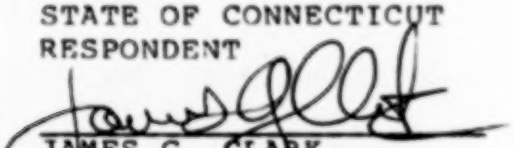
version of postarrest events. Doyle v. Ohio, supra, 426 U.S. at n. 11; United States v. Mavrick, supra, 601 F.2d at 932-33; United States v. Agee, supra, 597 F.2d at 353 n. 5. Moreover, the prosecutor never attempted to elicit from petitioner why he invoked his rights, nor did he focus on any material facts omitted from the postarrest statements. The prosecutor simply challenged the petitioner's direct testimony as to when he exercised his rights. In these circumstances the challenged cross-examination and rebuttal testimony violated no constitutional right. (Pet. App. A at 23a) Therefore the petitioner's claim is meritless.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT
RESPONDENT

BY: 

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No. 86-1605

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

PATRICK ROGERS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX

EXCERPT FROM STATE'S BRIEF TO THE CONNECTICUT APPELLATE COURT

C. If The Doyle Principle Applies, Any Error Was Harmless

Because the cross-examination of the defendant and the rebuttal testimony occurred after the defendant had opened the door to further exploration of the claimed Miranda violation, this Court should only consider whether the initial references to the defendant's exercise of his rights, made by Lieutenant Graham during the state's case-in-chief, were reversible error. The State submits that they were not.

"The applicability of the rule enunciated in Doyle. . .requires case-by-case application and permits a finding of harmless error." State v. Zeko, 177 Conn. at 554. Where the reference to the defendant's invocation

of his Miranda rights is not emphasized or linked with the defendant's exculpatory story and that story is weak in the face of strong evidence of guilt, the reference may constitute harmless error. State v. Pellegrino, 194 Conn. 279, 292, 480 A.2d 537 (1984). This criteria is satisfied here.

In the first instance, it is important to not that the prosecutor did not solicit this testimony, but rather, Lieutenant Graham spontaneously offered it while describing the scope and content of his interview with the defendant. In this situation, the State did not improperly elicit, introduce or emphasize the evidence of the defendant's invocation of his rights, and any error may be deemed harmless. United States v. Whitaker, 592 F.2d 826 (5th

Cir. 1979); United States v. Williams, 556 F.2d 65, 66 (D.C. Cir.), cert. denied, 431 U.S. 972 (1977); Hairston v. United States, 497 A.2d 1097, 1103-4 (D.C. App. 1985).

Second, the context of the reference is important. The emphasis of Lieutenant Graham's testimony was on the defendant's postarrest statements, not his subsequent silence.

> If the defendant makes an admissable statement, the recounting witness may conclude the account in a natural fashion by indicating that there is nothing more to say, because the defendant chose to stop. Otherwise, the jury, may erroneously infer that it was the police who cut the interview short, before the defendant had full opportunity to give his account.

United States v. Williams, 556 F.2d at 67; Parks v. State, 543 S.W.2d 855, 857 (Tenn. App. 1976); State v. Moye, supra.

While it is generally impermissible to introduce evidence of a defendant's postarrest request for counsel to show consciousness of guilt, United States v. Williams, supra; introduction of such evidence may constitute harmless error. Id.1

The initial reference to the defendant's request for counsel was not intentionally elicited by the prosecutor and was not utilized to show conscious-

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1 Although the defendant cites to Zemina v. Solem, 573 F.2d 1027 (8th Cir. 1978), a case involving a violation of the Sixth Amendment right to counsel, the defendant does not present a sixth amendment claim. The only issue briefed by the defendant is the claimed violation of his Miranda rights, to remain silent and to have the assistance of counsel to protect him in his dealings with the police. Thus it is the defendant's right to counsel under the fifth and fourteenth amendments which is at issue here. See State v. Barrett, 197 Conn. 50, 56, 495 A.2d 1044 (1985).

ness of guilt.2 Prior to making the reference, Lieutenant Graham had testified without objection that he had given the defendant the Miranda warnings:

> [Lieutenant Graham]: I told him that he had a right to remain silent and anything he said can and would be used against him in Court. That he had a right to an attorney and if he could not afford one, one would be provided for him at his request. That if he agreed to answer questions, he could stop answering at any time. And, also that if he agreed to answer questions, he could stop and request an attorney be present for any additional questioning.

T. I at 253. (Emphasis added).

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2 It is evident from the transcript quoted herein that the state did not utilize the defendant's request for an attorney as evidence of his guilt at trial. In the absence of a transcript of closing argument or objections thereto, if any, it must be presumed that the state did not unfairly or improperly utilize the evidence in closing argument.

The jury therefore knew that the defendant had been arrested and informed of his rights, and could have viewed the defendant's eventual invocation of his rights as an indication of his growing awareness of his legal predicament. Indeed, it is reasonable, in light of the jury verdict, to presume this view; the defendant was acquitted of burglary and unlawful restraint, two of the three charges arising from the same transaction as the sexual assault for which he was convicted. The jury should not be presumed to have inferred the defendant's guilt from the testimony that he invoked his rights, because the jury was able to evaluate the evidence as a whole, finding it sufficient on only one of the charges. Therefore any error in the reference to the defendant's

invocation of his Miranda rights was harmless beyond a reasonable doubt. See Schedule v. Florida, 405 U.S. 427, 431 (1972); State v. Leecan, 198 Conn. at 533.